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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1201~~. 855

LEWIS WALLACE, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 8, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1234.

LEWIS WALLACE, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, MAY 1, 1889.

1 In the Court of Claims.

LEWIS WALLACE
vs.
THE UNITED STATES. } 15589.

I.—*Note by the Clerk.*

The original petition was filed in this case March 14, 1887, and the amended petition to take the place of said original petition, under rule 8 of the rules of this Court, was filed March 22, 1887.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

II.—*Amended Petition. Filed M'ch* 22, 1887.

To the honorable the Court of Claims:

The claimant, Lewis Wallace, respectfully shows to this honorable Court:

The claimant was, on the 13th day of July, in the year 1882, duly appointed envoy extraordinary and minister plenipotentiary of the United States to Turkey, and held that office continuously from the time of said appointment till and including the 24th day of August, in the year 1885. By section 1675 of the Revised Statutes of the United States, as amended by act approved March 3, 1875, chap. 153, the salary of an envoy extraordinary and minister plenipotentiary was fixed at ten thousand dollars ($10,000) a year. Notwithstanding this provision of law, which was in force during the
2 whole time of claimant's aforesaid service, the claimant was only paid from the time of his appointment till and including the 30th day of June, 1885, at the rate of seven thousand five hundred dollars ($7,500) a year. This deficiency in the payment of the claimant's salary was caused by the insufficiency of the appropriations made by the Congress of the United States, who only appropriated for the period aforesaid at the rate of seven thousand five hundred dollars ($7,500) a year; but, as he is advised, the insufficiency of the appropriations so made constitutes, according to the decisions of this Court, no bar to his recovering in this Court the full compensation provided by the general and permanent law. The claimant therefore claims the difference between his salary at the rate of seven thousand five hundred dollars a year, appropriated and paid to him as aforesaid, and the salary of ten thousand dollars ($10,000) a year, provided by the general and permanent law. Said difference for the aforesaid time during which he was insufficiently paid, being a period of three years less twelve days, amounts to seven thousand four hundred and sixteen dollars and sixty-six cents ($7,416.66), which amount he claims.

No action has been had on this claim in Congress or by any of the Departments.

The claimant is the sole owner of this claim and the only person

interested therein, and no assignment or transfer of this claim or of any part thereof or interest therein has been made.

The claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimant is a citizen of the United States, and has at all times borne true allegiance to the Government thereof, and has not in any way voluntarily aided, abetted, or given encouragement to rebell-
3 ion against the said Government; and the claimant believes the facts as stated in this petition to be true; and the claimant demands judgment for seven thousand four hundred and sixteen dollars and sixty-six cents ($7,416.66.)

GEORGE A. KING,
Attorney for Claimant.

George A. King, being duly sworn, deposes and says: I am attorney for the claimant in this case. I have read the above amended petition, and the matters therein stated are true to the best of my knowledge and belief.

GEORGE A. KING.

Subscribed and sworn to before me this 22d day of March, 1887.
[SEAL.] JOHN RANDOLPH,
Ass't Cl'k C. C.

4 III.—*Traverse. Filed April* 9, 1887.

And now comes the Attorney General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations and asks judgment accordingly.

ROBERT A. HOWARD,
Ass't Att'y General.

5 IV.—*Findings of Fact and Conclusions of Law. Filed June* 18, 1888.

The Court upon the evidence finds the following facts:

I.

The claimant was, on the 13th day of July, in the year 1882, appointed envoy extraordinary and minister plenipotentiary of the United States to Turkey, and held that office continuously from the time of said appointment till and including the 24th day of August, 1885. (Commission of claimant and letter of Secretary of State.)

II.

The Secretary of State, in the estimate of the appropriations for the diplomatic and consular service for the following fiscal years, made the following specific estimate for the salary of the representative in Turkey as follows, to wit:

Turkey.

Ministers resident in * * * Turkey at $7,500.00 each (for fiscal year ending June 30, 1883).

Envoys extraordinary and ministers plenipotentiary to * * * and to Turkey, $7,500 (for the fiscal year ending June 30, 1884).

Envoys extraordinary and ministers plenipotentiary to * * * and to Turkey, $7,500 (for the fiscal year ending June 30, 1885).

Envoys extraordinary and ministers plenipotentiary to Turkey, $7,500; additional submitted, $2,500 (for fiscal year ending June 30, 1886).

6

III.

With his appointment or commission claimant also received the following notice from the Secretary of State:

DEPARTMENT OF STATE,
WASHINGTON, *July* 21, 1882.

Lew Wallace, Esquire, &c., &c., &c.

SIR: Congress having recently raised the grade of the legation at Constantinople to a plenipotentiary mission, and the President, by and with the advice and consent of the Senate, having appointed you to be envoy extraordinary and minister plenipotentiary of the United States of America to Turkey, I beg to transmit herewith the following papers: * * *

The act of Congress does not increase your compensation or contemplate other changes than as herein mentioned. You are referred to the personal instructions given you as minister resident, June 4, 1882, for the conduct of the business of the mission under your present appointment and for the necessary expenditures incident to the maintenance of the legation at Constantinople.

IV.

Claimant, in his first account with the Treasury Department, stated the same as follows:

"United States Government in acc't with Lew Wallace, minister plenipotentiary at Constantinople.

To am't of my salary from July 1st, 1882, to 30th September, 1882, 3 months, at the rate of $7,500 per annum."

The claimant charged and was allowed as said minister plenipotentiary, from July 13, 1882, to June 30, 1885, at the rate
7 of $7,500 per annum, as shown above, by copy of first account.

V.

The compensation paid to the claimant, from the time of his appointment till and including the 30th of June, 1885, was at the rate stated in his accounts, to wit, at the rate of $7,500 per annum, and claimant's account stands closed upon the books of the Treasury by payment in full.

VI.

Claimant was minister resident and consul general of the United States to Turkey at the date of his appointment as envoy extraordinary and minister plenipotentiary.

Conclusion of Law.

And upon the foregoing findings of fact the Court decides as conclusion of law that the petition should be dismissed under the decision of the Court in Francis case. (22 C. Cl's R., p. 403.)

8 V.—*Judgment of the Court.*

LEWIS WALLACE
vs.
THE UNITED STATES. } No. 15589.

At a Court of Claims held in the city of Washington on the 18th day of June, A. D. 1888, judgment in this case was ordered to be entered as follows:

The Court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the petition of the claimant, Lewis Wallace, be dismissed.

9 VI.—*Application of Claimant for and Allowance of Appeal.*

LEWIS WALLACE
vs.
THE UNITED STATES. } No. 15589.

From the judgment rendered in the above-entitled cause on the 18th day of June, 1888, in favor of the defendants the claimant, Lewis Wallace, by his attorney of record, George A. King, on the 27th day of June, 1888, makes application for and gives notice of an appeal to the Supreme Court of the United States.

GEORGE A. KING,
Attorney for Claimant.

Filed June 27, 1888.

Allowed June 27, 1888, in vacation.

WILLIAM A. RICHARDSON,
Chief Justice.

10 In the Court of Claims.

LEWIS WALLACE
vs.
THE UNITED STATES. } No. 15589.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the Court and the conclusion of law thereon, of the final judgment of the Court, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Washington, this fifth day of October, A. D. 1888.

(Seal of Ct. of Claims)

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: Court of Claims. No. 1234. Lewis Wallace, appellant, *vs.* The United States. Filed October 8, 1888.

Office Supreme Court U. S.
FILED,
JAN 10 1890
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

October Term, 1889.

No. 855.

LEWIS WALLACE, Appellant,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT.

GEORGE A. KING,
Attorney for Appellant.

BYRON REID, PRINTER, WASH.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

LEWIS WALLACE, APPELLANT,

v.

THE UNITED STATES.

No. 855.

Brief for Appellant.

1. STATEMENT OF THE CASE.

From July 13, 1882, until August 24, 1885, the claimant, Lewis Wallace, held the office of envoy extraordinary and minister plenipotentiary of the United States at the Empire of Turkey. At the time he entered upon the discharge of his duties, it was provided by statute as follows:

"That section one thousand six hundred and seventy-five of the Revised Statutes be amended so as to read as follows:

"SEC. 1675. Ambassadors and envoys extraordinary and ministers plenipotentiary shall be entitled to compensation at the rates following, per annum, namely:

"Those to France, Germany, Great Britain, and Russia, each seventeen thousand five hundred dollars.

"Those to Austria, Brazil, China, Italy, Japan, Mexico, and Spain, each twelve thousand dollars.

"Those to all other countries, unless where a different compensation is prescribed by law, each ten thousand dollars.

"And, unless when otherwise provided by law, ministers resident and commissioners shall be entitled to compensation at the rate of seventy-five per centum, chargés d'affaires at rate of fifty per centum, and secretaries of legation at the rate fifteen per centum of the amounts allowed to ambassadors, envoys extraordinary, and ministers plenipotentiary to the said countries, respectively, except that the secretary of legation to Japan shall be entitled to compensation at the rate of twenty-five hundred dollars per annum.

"The second secretaries of the legations to France, Germany, and Great Britain, shall be entitled to compensation at the rate of two thousand dollars each per annum."

Act of March 3, 1875, 18 Stat. L. 483, "An act to amend section 1675, 1676, 1681, and 1682 of the Revised Statutes of the United States."

The claimant was paid during his term of service at the rate of seven thousand five hundred dollars ($7,500) a year only, up to and including June 30, 1885.

The present suit was brought to recover the difference between that salary and the $10,000 a year fixed by the act of 1875 as the salary of an envoy extraordinary "to all other countries" than those enumerated, "unless where a different compensation is prescribed by law."

The consular and diplomatic appropriation act for the year ending June 30, 1883, approved July 1, 1882, 22 Stat. L. 128, contains the following among other appropriations:

"That the following sums be, and they are hereby, appropriated for the service of the fiscal year ending June 30th, 1883, out of any money in the Treasury not otherwise appropriated, for the objects hereinafter expressed, namely:

* * * * * * * * * *

"For salaries of envoys extraordinary and ministers plenipotentiary, as follows: To Chili and Peru at $10,000 each; to Turkey, $7,500; in all, $27,500."

The appropriation for the next following fiscal year, that ending June 30, 1884, is in precisely the same language, with a mere change of the year. 22 Stat. L. 424.

For the year ending June 30, 1885, the same amount was again appropriated in the following words:

"That the following sums be, and they are hereby, severally appropriated for the consular and diplomatic service of the fiscal year ending June 30th, 1885, out of any money in the Treasury not otherwise appropriated, for the objects hereinafter expressed, namely:

* * * * * * * * * *

"For salaries of envoys extraordinary and ministers plenipotentiary to the United States of Colombia and Turkey, at $7,500 each, $15,000."

23 Stat. L. 227, 228.

None of these three acts contained any declaration that the appropriations therein made should be "in full compensation for the service," or that "the salaries provided in this act for the officers within named, respectively, shall be in full for the annual salaries thereof," as was the case in some other appropriation acts.

At the time of the claimant's appointment as envoy extraordinary and minister plenipotentiary, he had been holding the office of minister resident and consul-general in Turkey and had been in receipt in that capacity of a salary of $7,500 a year.

The Court of Claims finds as facts that the Secretary of State estimated for the salary of the representative in Turkey at the rate of $7,500 a year for each of the three years for which the difference of salary between that sum

and $10,000 is now claimed, the estimate being for the first of those years for a minister resident, and for the other two for an envoy extraordinary and minister plenipotentiary; that when notified by the Secretary of State that the grade of the legation had been raised from that of minister resident to envoy extraordinary and minister plenipotentiary, he was in the same letter informed that "the act of Congress does not increase your compensation," and that he accordingly charged in his accounts and was allowed by the Government salary at the rate of only $7,500 a year during his whole period of service.

Upon these facts the Court of Claims decided as a conclusion of law that the claimant was not entitled to recover, and dismissed his petition; and from that judgment he appealed.

2. Assignment of Error.

The appellant hereby assigns the following error in the judgment of the Court of Claims:

That said court held that the lawful salary of the envoy extraordinary and minister plenipotentiary of the United States at the Empire of Turkey, from July 13, 1882, to June 30, 1885, was seven thousand five hundred dollars ($7,500) a year only, and dismissed the petition of claimant, which claimed salary at the rate of ten thousand dollars ($10,000) a year, whereas said court should have held that the lawful salary of such envoy extraordinary and minister plenipotentiary was ten thousand dollars ($10,000) a year, and should have rendered judgment in the claimant's favor for the difference between said two rates of salary, amounting for the period of three years, less twelve days, to seven thousand four hundred and sixteen dollars and sixty-six cents ($7,416.66).

3. Brief of Argument.

In the case of *United States* v. *Langston*, 118 U. S. 389, this Court decided that an officer in the diplomatic or consular service, with a salary fixed by statute without any limitation as to time, was entitled to receive that salary, notwithstanding the fact that subsequent enactments appropriated a less amount for the services of the officer for particular fiscal years, provided they contained no words expressly or by clear implication modifying or repealing the previous law.

In the present case the provisions of section 1675 of the Revised Statutes, as amended by the act of 1875, provided for a salary of $10,000 a year to envoys extraordinary and ministers plenipotentiary to all other countries than those named, and Turkey was not of those named. At the time of the appointment of the claimant to the office of envoy extraordinary and minister plenipotentiary to Turkey in July, 1882, there certainly had been no express repeal of this statute, and the only question before the Court is whether there had been an implied repeal.

To understand the purpose of Congress in the passage of the act of March 3, 1875, amending section 1675 of the Revised Statutes, it will be necessary to refer to the antecedent legislation on the subject of diplomatic compensation.

Prior to 1855 it had been quite common for Congress to appropriate a sum in gross for the expenses of intercourse with foreign nations, leaving the establishment of both the offices and salaries to the Executive; but on March 1, 1855, some change was made in this system by the act entitled, "An act to remodel the diplomatic and consular systems of the United States," 10 Stat. L., 619, by the first section of which it was enacted as follows:

"That from and after the thirtieth day of June next the President of the United States shall, by and with the advice and consent of the Senate, appoint representatives of the grade of envoys extraordinary and ministers plenipotentiary to the following countries, who shall receive an annual compensation for their services, not exceeding the amount specified herein for each:

"Great Britain, seventeen thousand five hundred dollars.

"France, fifteen thousand dollars.

"Spain, twelve thousand dollars;" and continuing down to—

"Mexico, twelve thousand dollars."

On the 25th of May, 1855, Caleb Cushing, then Attorney-General, rendered an opinion on the construction of this act, in which it was held that it was not within the power of Congress to direct the President to appoint a minister of any particular rank at any particular place, but that the places to which appointments should be made, as well as the rank of the minister appointed to each capital, was dependent solely on the will of the President, subject only to the confirming power of the Senate. 7 Opin. Att'y-Gen., 186.

Thereupon Congress promptly at its next session, on August 18, 1856, passed "An act to regulate the diplomatic and consular systems of the United States," 11 Stat. L. 52, by the first section of which it was enacted as follows:

"That ambassadors, envoys extraordinary, and ministers plenipotentiary; ministers resident, commissioners, chargés d'affaires, and secretaries of legation, appointed to the countries hereinafter named in schedule A, shall be entitled to compensation for their services, respectively, at the rates per annum hereinafter specified; that is to say, ambassadors and envoys extraordinary and ministers plenipotentiary, the full amounts specified therefor in said

schedule A; ministers resident and commissioners, seventy-five per centum; chargés d'affaires, fifty per centum; and secretaries of legation fifteen per centum, of the said amounts, respectively: *Provided*, That the compensation of the secretary of the legation to China, acting as interpreter, shall be at the rate of five thousand dollars, and if not acting as such, at the rate of three thousand dollars; and that of the secretary of legation to Turkey, acting as dragoman, at the rate of three thousand dollars, and if not acting as such, at the rate of two thousand dollars per annum.

"SCHEDULE A.

"Great Britain and France, each, seventeen thousand five hundred dollars; Russia, Spain, Austria, Prussia, Brazil, Mexico, and China, each twelve thousand dollars.

"All other countries, each ten thousand dollars."

For nearly twenty years—that is, until the enactment of the Revised Statutes—this act constituted the only statutory authority outside of the appropriation acts for the appointment of any diplomatic representative whatever to Turkey, or, with very few exceptions, to any other country.

When Congress came in 1874 to revise the statutes, section 1675 was erroneously made to enact not a sliding scale graduated according to rank like the act of 1856, but a fixed salary designating the grade of the particular representative to each court, and fixing his salary.

This inadvertent return to the unconstitutional assumptions of the act of 1855 was corrected in less than a year by the enactment of the act of March 3, 1875, hereinbefore set forth, entitled "An act to amend sections 1675, 1676, 1681, and 1682 of the Revised Statutes of the United States." The debate on this bill was in each House very brief, but in each it was distinctly understood and stated that the object of it was simply to restore the law to what

it had been before the passage of the Revised Statutes, and to correct the error made in the revision. Cong. Rec. 43d Cong. 2d Sess. Part 3, pp. 2068, 2236. The purpose, in other words, was to re-enact the first section of the act of August 18, 1856. Thus it will be seen that Congress by its action in 1875, in correcting the unconstitutional legislation contained in the Revised Statutes of 1874, conceded the principles so ably maintained by Attorney-General Cushing in his opinion of 1855, and admitted the power of the President to "nominate, and by and with the advice and consent of the Senate, appoint ambassadors, other public ministers, and consuls" independently of any authority from Congress. That view of the Constitution is maintained and enforced in the most cogent manner in this masterly opinion, from which we beg leave to cite a few passages, and for extended illustration of the doctrines thus laid down the Court is respectfully referred to the opinion itself:

"Thus it is perceived that the Constitution, specifying 'ambassadors' only, as examples of a class, empowers the President to appoint these and other 'public ministers,' that is, any such officers as by the law of nations are recognized as 'public ministers,' without making the appointment of them subject, like 'other (non-enumerated) officers,' to the exigency of an authorizing act of Congress. In a word, the power to appoint diplomatic agents, and to select for employment any one out of the varieties of the class, according to his judgment of the public service, is a constitutional function of the President, not derived from, nor limitable by, Congress, but requiring only the ultimate concurrence of the Senate; and so it was understood in the early practice of the Government.

"At this period of time, the only pertinent point seriously made was whether the Senate were to judge of the expediency of the mission or negotiation, or of the fitness of the person. (Marshall's Life of Washington, vol. v, p.

370, note; Story's Com. Const., vol. ii, p. 332, note.) It was not pretended that an act of Congress constituted the essential prerequisite of the rank or designation of a minister, or the institution of a mission or negotiation by the Executive."

(7 Opin. Att'y-Gen. 193.)

"All this power, considerations of public policy require to be lodged with the Executive; because of the nature of diplomatic business, which exacts the use of negotiators, single persons to confer with single persons, either at home, and more especially in foreign countries. And however the various denominations of public ministers may be artificial, yet, practically, distinctions even of mere dignity, or personal relation, are of the most decisive result in human affairs, and not to be overlooked without prejudice in the foreign affairs of the Government; to say nothing of the question of access to the sovereign, which, according to diplomatic form and usage, depends on the rank of the foreign minister."

(7 Opin. Atty.-Gen. 197.)

"Thus we of necessity reach the conclusion, that the true and only effect of the act, in this relation, is to say, that if, and whenever the President shall, by and with the advice and consent of the Senate, appoint an envoy extraordinary and minister plenipotentiary to Great Britain, or to Sweden, the compensation of that minister shall be so much and no more. It could not constitutionally say, and does not pretend to say, that if, under any contingencies of political relation, it should become not possible, not honorable, not expedient for the United States to have such a minister of the highest rank in Great Britain or in Sweden, and still the public honor and interests required the legation to be maintained, that it might not be done by means of a minister of secondary rank, a minister resident, a chargé d'affaires, or even an agent without title. It does not pretend to say that the President must, contrary to the judgment of himself and of the Senate, appoint a minister of the highest rank at every court of Europe or America."

(7 Opin. Atty.-Gen. 220.)

"In regard to compensation, it provides what it may be at each of the courts enumerated for a minister of a particular grade, or for a secretary, if such minister or secretary shall happen to have been appointed. If the President see fit to appoint or retain, at either of these courts, a minister of some other grade, for instance, minister resident, or chargé d'affaires, existing laws are to be looked into for knowledge of the rate of compensation. This act does not profess to repeal, nor does it by possible implication in fact repeal, the rate of salary previously fixed for any ministers but those of the rank of envoy extraordinary. It withdraws outfit and infit from all, but it leaves unchanged the statute compensation of ministers resident and chargés d'affaires."

(7 Opin. Atty.-Gen. 220.)

"For, in truth, as we have seen, these two sections have but one possible import, which is, that after a certain day, if in point of fact there be such ministers and such secretaries at such and such places, then they shall be allowed not exceeding so much compensation."

(7 Opin. Atty.-Gen. 221.)

Mr. Cushing's views of the Presidential powers under this clause of the Constitution were reiterated by President Grant when, in attaching his approval to the consular and diplomatic appropriation act of 1876, 19 Stat. L. 170, 175, which contained a clause requiring the Secretary of State to notify diplomatic and consular officers for whom no salaries were appropriated therein to "close their offices," he felt called upon to send the House of Representatives a special message containing the following dignified expression of protest against encroachment upon the constitutional powers of the Executive:

* * * "In the literal sense of this direction it would be an invasion of the constitutional prerogative and duty of the Executive. * * * In calling attention to the passage which I have indicated, I assume that the inten-

tion of the provision is only to exercise the constitutional prerogative of Congress over the expenditures of the Government and to fix a time at which the compensation of certain diplomatic and consular officers shall cease, and not to invade the constitutional rights of the Executive, which I should be compelled to resist; and my present object is not to discuss or dispute the wisdom of failing to appropriate for several offices, but to guard against a construction that might possibly be placed on the language used as implying a right in the legislative branch to direct the closing or discontinuing of any of the diplomatic or consular offices of the Government." (House Ex. Doc. 192, 44th Cong. 1st Sess.)

As the Court of Claims says in the recent case of *Foote* v. *United States*, 23 C. Cls. 443, 449, decided subsequently to the case now before the Court:

"The course of legislation has generally been in accord with the interpretation claimed for the Executive. We have found but few statute provisions in which Congress appears to have directly dictated as to the establishment of diplomatic offices.

"These are found in the following sections of the Revised Statutes. Section 1682 (first enacted in 1872, 17 Stat. L. 142) provides that 'there shall be but one minister resident accredited to Guatemala, Costa Rica, Honduras, Salvador, and Nicaragua.' Section 1683 provides that 'there shall be a diplomatic representative of the United States to each of the Republics of Hayti and Liberia.' This section was first enacted in 1862, June 5, chapter 96 (12 Stat. L. 421), where the President was 'authorized,' not required to appoint. The title of the office was changed by act of 1866, July 25, chapter 233 (14 Stat. L. 225). The act of July 7, 1884, chapter 333 (23 Stat. L. 228), provided that 'the minister resident and consul-general at Hayti shall also be accredited as chargé d'affaires to Santo Domingo.'

With those exceptions Congress has either appropriated a sum in gross 'for the expenses of intercourse with for-

eign nations,' leaving the establishment of both the offices and the salaries to the Executive, as in the early years of the Government pointed out in Byer's case ; or as now, by Revised Statutes section 1675, fixing the salaries for all the diplomatic offices actually existing, and establishing rates for all others, thus apparently conceding power in the Executive to make diplomatic appointments other than those expressly recognized by Congress.

"Perhaps these recent exceptions may be interpreted only as indicating the offices that Congress was willing to appropriate salaries for, and not as interfering with the constitutional rights claimed for the President."

The acts of Congress of 1856 and 1875 have been in accord with both the spirit and letter of the Constitution as interpreted by Attorney-General Cushing, by President Grant in his message to the House of Representatives in 1876, and by the Court of Claims in the Foote case.

In 1855 Congress had inadvertently assumed power which did not belong to it by dictating to the President the countries to which he should accredit diplomatic representatives, and the rank which each of those representatives should hold, and in 1856 it promptly corrected this error when its attention was called to it by enacting a law which left it to the President to fix the rank and geographical location of each diplomatic representative of the United States, and enacted a sliding scale which merely provided for compensating the representatives when so appointed by the President according to the grade conferred by him upon them ; giving them (when appointed to any of the non-enumerated countries), if an envoy extraordinary and minister plenipotentiary, ten thousand dollars, if a minister resident, seventy-five per cent. of that sum or seven thousand five hundred dollars, or if a chargé d'affaires, fifty per cent. of that sum, or five thousand dollars.

It is significant, too, of the intention of Congress in the passage of this act that it should have named ambassadors among the representatives whose compensation and possible appointment by the President were provided for, as no appointment of any ambassador has ever been made in the history of the Government.

And when in 1874 the Revised Statutes mistakenly returned to the act of 1855 as the basis of diplomatic compensation, and fixed a rigid schedule of places, ranks, and salaries, thus cutting off, so far as Congress could do it, the discretionary power of the President in making these appointments, it a second time corrected the error into which it had fallen, and by the act of 1875 restored the schedule of 1856, leaving the President free to appoint according to his constitutional power an envoy extraordinary and minister plenipotentiary, or even an ambassador, to one country, a minister resident to another, and a chargé d'affaires to a third; or even to the same country, as the changing wants and necessities of the service should dictate, a chargé d'affaires one year, a minister resident another, and an envoy extraordinary and minister plenipotentiary the third. But to each of these officers, when appointed by virtue of the constitutional power of the President, the act of Congress immediately attached a salary deemed in the legislative mind commensurate to the dignity of the diplomatic grade and the importance of the country to which he, the representative, should be accredited.

Applying these views of the statute of 1875 to the case in hand, it is easy to perceive that there can have been no intention on the part of Congress, by failing to appropriate in any one year or series of years a salary for the benefit of an envoy extraordinary and minister plenipotentiary to Turkey, to repeal the general provision of that statute

which gave to a minister of that grade at the capital of Turkey, whenever the President in his wisdom should see fit to make such an appointment, a salary of $10,000 a year. The statute, in fact, anticipated in advance the very thing that happened in regard to the mission to Turkey, viz., that it might be thought advisable from time to time to vary the rank of the diplomatic representative at the court of Constantinople. When, therefore, at some date prior to 1882, Mr. Wallace had, as this record discloses, been appointed diplomatic representative to Turkey, with the rank of minister resident, he became entitled by that appointment to the salary of $7,500, annexed by law to that grade. There was in that appointment of him as minister resident not only nothing inconsistent with that part of the statute, which provided in effect that *if* an envoy extraordinary and minister plenipotentiary were appointed to Turkey he should receive $10,000, but the one proposition necessarily implied the other; for the salary of $10,000, which the statute first fixed as that of an envoy extraordinary and minister plenipotentiary, was made the standard by which the compensation of all diplomatic representatives of inferior rank was to be computed. In other words, in order to know what would be the statutory compensation of a minister resident to Turkey, it is necessary to inquire what would be the compensation of an envoy extraordinary and minister plenipotentiary to that country, and then to compute seventy-five per cent. thereon; and the result will give the salary of a minister resident.

It is conclusively to be presumed, therefore, that the President, in the exercise of that discretion which the Constitution reposes in him relative to our foreign affairs, had determined at the time of Mr. Wallace's appointment as minister resident that the state of our diplomatic relations with Turkey warranted the appointment of a representa-

tive of that grade, and none other; and that on the 13th of July, 1882, other circumstances had in his judgment created the occasion for a change in the grade of the representative to that country, and that it was for the interest of the country that thereafter it should be represented at that court by a diplomat of the superior rank of envoy extraordinary and minister plenipotentiary. Whether in reaching this conclusion the President was guided to some extent by the appropriations supplied by Congress in the annual appropriation acts we need not stop to inquire. At most they could only operate as advisory. Whenever the Presidential judgment should be exercised to change the rank of the minister, the statute of 1875 at once intervened and attached to the changed mission a changed salary, increasing or decreasing it with the elevation or degradation of the officer.

Hence, when on July 13, 1882, Mr. Wallace was raised by the President from the rank of minister resident to that of envoy extraordinary and minister plenipotentiary, he was in no need of information from the Secretary of State as to what his salary would be in his new capacity. The statute determined that for him. The duties of the Secretary of State are important, and his powers extensive; but among them we fail to find that of fixing the salaries of diplomatic officers. That function is vested by the Constitution in Congress alone, and after it had by the act of 1875 exercised that power by fixing the salary of an envoy extraordinary and minister plenipotentiary at $10,000, it was pure assumption on the part of the Secretary of State (if his letter has that meaning) to undertake to say that the salary of an officer of that grade should be some other or different amount; for the Secretary could exercise no greater powers than were conferred upon him by the laws creating his office, and limiting and defining its duties.

(*The Floyd Acceptances*, 7 Wall. 666, 680.) The Secretary of State, therefore, though the official superior of the minister to Constantinople, could no more fix the latter's salary than could the minister fix that of the Secretary. The attempt in either case would be equally unavailing.

As to the accounts for salary drawn by the claimant at the rate of $7,500 a year, they must be construed in the light of the circumstances under which they were given. It would hardly have been respectful of the claimant to have insisted at the time upon a payment of a greater salary than his official superior informed him he was to receive, whether that superior was right or wrong. Besides, the claimant doubtless knew that Congress had appropriated but $7,500 a year towards the payment of his salary, which would have rendered it impossible for the officers of either the State or Treasury Department to have allowed him to draw at the time a greater sum in payment. "No money shall be drawn from the Treasury but in consequence of appropriations made by law" (Constitution, Article 1, sec. 9). Hence the claimant's only course was to take on account the salary appropriated in the annual appropriation act, and sue for the balance in the Court of Claims, and thus obtain payment "out of any general appropriation made by law for the payment and satisfaction of private claims." Rev. Stat. sec. 1089. In *United States* v. *Langston*, 118 U. S. 389, this Court gave no force or effect to the circumstance that the claimant had received, as in this case, for three years without objection, the reduced salary contained in the appropriation acts, but notwithstanding that fact awarded him judgment for the difference.

Nor did the Court in that case deem the reduced estimates made by the State Department, and referred to in the opinion, p. 391, as having any unfavorable bearing upon the case. Rather would they show that Congress

must have been in some measure misled into appropriating smaller amounts than the salary laws required, thus negativing the idea of a deliberate and intentional change in the compensation legally attached to the office.

The doctrine, as applied to claims against the Government, that a receipt in full operates in full satisfaction, applies only to cases of disputed claims subject to compromise, and has no application to the case of a salary fixed by law and insufficiently paid only through lack of the necessary funds owing to reduced appropriations by Congress. *United States* v. *Bostwick*, 94 U. S. 53, 67; *United States* v. *Langston*, 118 U. S. 389; *Mitchell* v. *United States*, 18 C. Cls. 281, 287, 288 (reversed by this Court on a different point, 109 U. S. 146.)

Another view might also be taken leading to the same result. Salaries are not conferred upon public officers for their own advantage, but as a means of keeping up the dignity of the office. 2 Story Eq. Jur. sec. 1040, *e*, *f*, *g*. Upon this ground the policy of the law does not permit officers to assign away their salaries. For the same reason, on grounds of public policy, no officer should be permitted to waive his right to the salary affixed by law to the office; for instance, the President would doubtless have no difficulty in finding plenty of persons willing and ready to serve as members of his Cabinet at one-half the salaries allowed by law, but it would hardly be contended that he could auction the high public offices of State to the lowest bidder, even though several thousand dollars might be saved in actual cash to the public Treasury by such a course.

Reference is made by the Court of Claims in its conclusion of law to its prior decision in the case of *Francis* v. *United States*, 22 C. Cls. 403, in support of its ruling in this case; but that case was quite different from this.

There the act of 1875 was relied upon by the claimant as here; and the question was whether that portion of it which gives a salary of $7,500 to a "minister resident" had any application to the case of a person appointed to be "minister resident *and consul-general*," and for whose services in this double capacity the annual appropriation acts had appropriated $5,000. It was held that it had not; and that the "minister resident and consul-general" was a different officer from a "minister resident," and could not claim the benefit of statutory provisions applicable to the latter officer. In this case no such question arises, for the office of envoy extraordinary and minister plenipotentiary is the *exact office* to which the act of 1875 had affixed a salary of $10,000 a year, and it is the only office held by the present claimant during the period for which he now seeks to recover the statutory compensation of such office. Consular duties or functions were not annexed to it.

As it has already been settled by the decision in *United States* v. *Langston*, 118 U. S. 389, that these very appropriation acts of 1882, 1883, and 1884 did not operate to repeal prior provisions of law fixing salaries of diplomatic officers, it is difficult to see upon what ground the application of the rule enunciated by that case to the present can be successfully resisted. In the first two of these acts, those of 1882 and 1883, 22 Stat. L. 128, 424, the form of expression with reference to envoys extraordinary and ministers plenipotentiary on the one hand, and ministers resident and consuls-general on the other, is slightly different. The clause relating to the former reads "For salaries of envoys extraordinary and ministers plenipotentiary," etc., while as to the latter it is "For ministers resident and consuls-general," etc. But in the act of 1884, which was also before the Court in Langston's case, the form of the

appropriation is identical, it being "For *salaries of* envoys extraordinary and ministers plenipotentiary," etc., and "For *salaries of* ministers resident and consuls-general," etc. It having been held in regard to the latter clause that it had not the effect, in the absence of other expressions indicating an intention to reduce the salary to the amount appropriated, of so reducing it, the same construction must be given to the words of the the clause referring to envoys extraordinary and ministers plenipotentiary, for it is a rule of construction that no greater or other effect is to be given to the words in one part of a statute than is attached to the same words in some other part of that statute. *Reiche* v. *Smythe*, 13 Wall. 162, 164.

Indeed, the exact similarity of this case and that of Langston in principle can only be understood by adverting to the fact that the salary of the office of minister resident and consul-general to Hayti, held by Langston, was by the act which originally established it fixed solely by reference to the salary act of 1856, above cited. The act of 1862, which originally established that office, 12 Stat. L., 421, provided that the diplomatic representatives to Hayti and Liberia "shall receive the compensation of commissioners according to the act of Congress approved August 18, 1856." And when the act of 1862 was carried into the Revised Statutes as section 1683, it was made to provide that such representative "shall be entitled to a salary of seven thousand five hundred dollars a year," the exact salary of a commissioner or minister resident under the act of 1856. It having been held by this Court in *United States* v. *Langston*, 118 U. S. 389, that the salary —thus originally fixed by reference to the act of 1856— could not be deemed reduced by a mere appropriation of a less amount, it must likewise be held in the present case that the salary of the envoy extraordinary and minister

plenipotentiary to Turkey, as fixed by the same act of 1856, repeated by that of 1875, cannot be reduced by the same fact of diminished appropriation.

In the more recent case of *Foote* v. *United States*, 23 Ct. Cls. 443, the Court of Claims has apparently receded from the position assumed in the present case, and has held that envoys extraordinary and ministers plenipotentiary are entitled to recover the full amount of their compensation as fixed by the act of 1875, less any amounts already paid, and that such acts making insufficient appropriations constitute no defence. The opinion in that case by Mr. Chief-Justice Richardson is a very able exposition of the subject, and makes it evident that if this case were now to come before the Court of Claims in the light of its more fully and deliberately considered conclusions in the Foote case the result would be favorable to the claimant.

It is therefore respectfully submitted:

1. That the claimant became entitled by his appointment as envoy extraordinary and minister plenipotentiary to a salary of $10,000 a year, by virtue of the act of Congress of 1875.

2. That he is not debarred from receiving that amount by the provisions of annual appropriation acts appropriating $7,500 a year towards the salary of that office, without any words expressly or by clear implication repealing the previous law.

3. That having received that amount and no more, he is now entitled to recover the difference in this suit.

The judgment of the Court of Claims should therefore be reversed, and the cause remanded with instructions to enter judgment for the amount of this difference, $7,416.66.

Very respectfully submitted.

GEORGE A. KING,
Attorney for Claimant.

Office Supreme Court U. S.
FILED.
JAN 10 1890
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

LEWIS WALLACE, APPELLANT,
v.
THE UNITED STATES. } *No.* 855.

Brief for Appellant in Reply.

The only point contained in the able brief submitted on behalf of the United States to which counsel for appellant feels called upon to reply, is the suggestion that this case is distinguishable from *United States* v. *Langston*, 118 U. S. 389, in the fact that here the words "*unless where a different compensation is prescribed by law*," are inserted in the statute which fixes the salary for envoy extraordinary and minister plenipotentiary to Turkey, while they are omitted in the statute fixing the salary for the mission at Hayti.

As to this, learned counsel for the United States contend that these words have, in part, a prospective effect and authorize a reduction of the established salary by simply appropriating a less sum.

To this I reply—

1. That *if* these words are prospective they protect rather than impair the appellant's interests, by providing that the amount fixed in the section (1675) containing them shall continue to be the lawful salary regardless of the sum appropriated, until the same is changed by a direct provision of law. An appropriation act appropriating an insufficient sum for the payment of a salary fixed by pre-existing statute is *not* "a law *prescribing* a different compensation," as this Court held in Langston's case.

2. But these words had not, nor were designed to have, any prospective effect whatever. It cannot be supposed that the Congress of 1875 assumed that they alone had control of these salaries for all future time, and that their successors could alter or amend the same only by their leave. Section 1675, having fixed the salaries of a whole class not therein enumerated, undertakes, by these additional words, to except from that class any mission that may have been elsewhere separately considered and provided for according to their respective conditions, importance, or peculiarities.

These qualifying words, therefore, have no prospective effect, and do not take the case at bar out of the rule in Langston's case.

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Attorney for Appellant.

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BRIEF FOR THE UNITED STATES.

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BRIEF FOR THE UNITED STATES.

The facts of this case fully appear from the findings of the Court of Claims and the statement in the brief of the appellant. They may be epitomized for the purposes of this argument.

In the year 1882 Lewis Wallace was minister resident and consul-general of the United States to Turkey. In the estimate for appropriation for the consular and diplomatic service for the fiscal year ending June 30, 1883, the Secretary of State made the following specific estimate:

> Ministers resident in * * * and Turkey, at $7,500 each.

In the appropriation act for that fiscal year, approved July 1, 1882, the specific appropriation for the representative to Turkey was as follows:

> For salaries of envoys extraordinary and ministers plenipotentiary * * * to Turkey, $7,500.

On July 21 General Wallace received, with his commission, a notification, in which was stated:

> SIR: Congress having recently raised the grade of the legation at Constantinople to a plenipotentiary

> mission, and the President, by and with the advice and consent of the Senate, having appointed you to be envoy extraordinary and minister plenipotentiary of the United States of America to Turkey, I beg to transmit herewith the following papers.
>
> * * * * *
>
> The act of Congress does not increase your compensation or contemplate other changes than as therein mentioned.

General Wallace stated his accounts and received pay for his salary at the rate of $7,500 per annum from July 13, 1882, the date of his commission, to June 30, 1885, the date of his retirement from service, and his account stands closed upon the books of the Treasury by payment in full.

There are some historical facts to be taken in connection with the above statement. While the appropriation act above mentioned for 1883 was in preparation and pending, in response to a letter from the chairman of the Committee on Foreign Affairs of the House of Representatives, the Secretary of State wrote:

> The raising of the rank of the mission at Constantinople to the plenipotentiary grade is very desirable. Both national decorum and official utility require that the United States should occupy a proper place in the foreign representation at the Ottoman capital.

And during the debates, the gentleman in charge of the bill in the House, when this clause was reached, said:

> The next change is simply in title. At present we have a minister resident to Turkey, at a salary of $7,500.
>
> * * * * * *

His rank is advanced, but not his pay.

The bill passed and became a law as above. (22 Stat. L., 129.)

ARGUMENT.

I.

This suit, which is for a balance of salary claimed to be due, is based, as we shall hereafter see, upon statutes relating to the compensation of diplomatic representatives. A theorem is sought to be established from these statutes by which the salary of the minister is determined by the grade of the embassy. But the practice of our Government and the limitations in the laws prohibit the universality of this rule. We shall contend it can not be applied in this case.

A change from a lower to a higher diplomatic grade does not necessarily import an increase of salary.

During the debates in the convention which framed the Constitution two modes were proposed for the appointment of ambassadors and ministers to foreign nations. It is probable that the original idea was that the Senate should have sole and exclusive control of all matters of intercourse with other nations; and so, in the plan of a Federal constitution submitted by Mr. Charles Pinckney, the Senate was given the sole and exclusive power to declare war and to make treaties and to appoint ambassadors, and other ministers to foreign nations. (Journ. Conv., 148; Madison Pap., 131, 523.) However, in the first draught of the Constitution reported by the committee of five a distinction seems to have been made between the appointment of ambassadors and other public ministers;

the power to appoint the former having been given to the Senate, whilst the President, under the general authority to appoint officers in all cases not otherwise provided for in the Constitution, was authorized to appoint the latter. (Journ. of Conv., pp. 224–228.)

In the report of the committee of eleven, the President was empowered to nominate and, by and with the advice and consent of the Senate, to appoint ambassadors and other public ministers.

It may be remarked that the convention refused to amend this clause by the substitution of the words "foreign ministers" instead of "ambassadors and other public ministers."

An amendment was unanimously passed to include consuls, and the clause adopted as it stands at present in the Constitution. (Journ. Conv., 284–292.)

It will thus be seen that the degrees of representation and the several ranks of public ministers were recognized at the time of the adoption of our plan of government.

Ambassadors had been employed from the most ancient times; ministers of less exalted rank from the time of Louis XI of France; and resident ministers after the peace of Westphalia in 1684. By the Congresses of Vienna and Aix La Chapelle four kinds of embassies were recognized:

(1). Ambassadors, legates, nuncios of the Pope.
(2). Ministers plenipotentiary and envoys.
(3). Ministers resident.
(4). Charges d'affaires.

(Vattel, B. IV. Ch. VI; I Whart. Int. L. Dig., par. 88.)

These designations and grades are acknowledged by all civilized nations. Attorney-General Cushing, in an exhaustive opinion, from which we will upon other points hereafter make extracts, says:

> Thus it is perceived that the Constitution, specifying "ambassadors" only, as examples of a class, empowers the President to appoint these and other "public ministers," that is, any such officers as by the law of nations are recognized as "public ministers," without making the appointment of them subject, like "other (non-enumerated) officers," to the exigency of an authorizing act of Congress. In a word, the power to appoint diplomatic agents, and to select for employment any one out of the varieties of the class, according to his judgment of the public service, is a constitutional function of the President, not derived from, nor limitable by, Congress, but requiring only the ultimate concurrence of the Senate; and so it was understood in the early practice of the Government. (7 Op., 193).

And again, after a historical statement, Mr. Cushing says:

> On this full retrospect of the entire legislation and executive practice of the Government it is thus seen that there is no law, which prescribes the power, the name, the rank, the number, the time, or the place of our public ministers; that when acts of Congress mention either of those incidents, it is only to make appropriations, or at most to offer suggestive recommendations.
>
> Of course, it became the established rule for the President, by and with the advice and consent of the

Senate, and according to his and their judgment, to appoint such ministers, with such powers, at such times, to such places, as the public interest might seem to demand, with no limitation save in the fact of there being a defined salary for four only of the denominations of public ministers; and then, either before or after the appointment, presenting estimates for the requisite expenditure. At first, as we have perceived, appropriation was made in a gross sum to cover all the expenses of foreign intercourse, including salaries of ministers. Afterwards, and since it grew to be customary to make appropriations more specific, the practice has been to make estimates and to pass appropriations for the aggregate salaries and outfits, first of unenumerated and then of enumerated ministers, secretaries of legation, and chargés d'affaires, with specific items of appropriations for contingent expenses of missions abroad and of foreign intercourse.

As the President appointed negotiating agents of himself, and ministers proper with consultation of the Senate alone, so he reduced or discontinued a mission in his discretion; and his power to make this change is impliedly recognized by the express terms of act of Congress. (Act of May 18, 1842, No. 195, v. Stat. at Large, p. 486.)

The President's power of appointment is practically limited, to a certain degree, by the necessity of obtaining appropriations from Congress to defray the expenses of a mission; but this limitation is in effect removed by the appropriation of a sum of money for the contingent expenses of foreign intercourse, on which the President may draw for an appointment publicly made, or even for a secret appointment, under the power of the President to file a certificate of any sum expended without explanation of the object of expenditure. Besides which an officer may

lawfully be, and occasionally is, appointed, either a statute officer or other, without any existing provision for his compensation, which, if he be lawfully appointed, creates a valid debt against the Government (pp. 208–209).

In respect to their functions as related to their titles, the diplomatic agents of the United States spoken of in the acts of Congress are not reducible to any uniform rule of designation and consequent rank. In the different statutes we have chargés d'affaires of permanent station; officers of each name with all the powers usually accorded to a minister plenipotentiary; commissioners accredited to a court, as in the case of the minister to the Sandwich Islands, and envoys not accredited to any court, as in the case of the ministers to the congress at Panama.

* * * * *

In truth, neither the power nor the functions of a public minister with us have the least regard to his title. That and the salary are questions of dignity only. None of our ministers have, in strictness, *full* powers, because they are confined by their instructions, and still more by the limited powers of the Federal Government, from which ensues the necessity of limited powers to each one of its functionaries. Within the range of constitutional authority they have such powers as the President sees fit to grant, and no more. On the other hand, whatever their title of dignity, and whatever the salary allowed to support that more or less of dignity, they are, each and all, in virtue of their commissions under the great seal of the United States, the unquestionable representatives *pro tanto* of the sovereignty of the United States (pp. 210–211).

* * * * *

It is the undeniable fact that "public ministers,"

> *as a class*, are created by the Constitution and the law of nations, not by act of Congress. No act of Congress created the offices of minister to Great Britain, France, Spain, Portugal, the United Provinces, and other countries, to which ministers were sent by President Washington. They were not even mentioned in acts of appropriation. And thoughtful men have held that wherever no "ambassador" or other "public minister" exists at the moment, and the exigency for one springs up, there is a "vacancy" in the true spirit of the Constitution (p. 212).

Upon this question of the distinction between public ministers of different ranks, Mr. Wheaton, in his treatise, says:

> So far as the relative rank of diplomatic agents may be determined by the nature of their respective functions, there is no essential difference between public ministers of the first class and those of the second. Both are accredited by the sovereign or supreme executive power of the state to a foreign sovereign. The distinction between ambassadors and envoys was originally grounded upon the supposition that the former are authorized to negotiate directly with the sovereign himself, whilst the latter, although accredited to him, are only authorized to treat with the minister of foreign affairs or other person empowered by the sovereign. The authority to treat directly with the sovereign was supposed to involve a higher degree of confidence, and to entitle the person on whom it was conferred to the honors due to the highest rank of public ministers. This distinction, so far as it is founded upon any essential difference between the functions of the two classes of diplomatic agents, is more apparent than real. The usage of all times, and especially the more recent times, authorizes public ministers of every class to confer, on all suitable

occasions, with the sovereign at whose court they are accredited, on the political relations between the two states.

But even at those periods when the etiquette of European courts confined this privilege to ambassadors, such verbal conferences with the sovereign were never considered as binding official acts. Negotiations were then, as now, conducted and concluded with the minister of foreign affairs, and it is through him that the determinations of the sovereign are made known to foreign ministers of every class. If this observation be applicable as between States, according to whose constitutions of government negotiations may, under certain circumstances, be conducted directly between their respective sovereigns, it is still more applicable to representative governments, whether constitutional monarchies or republics. If the former, the sovereign acts, or is supposed to act, only through his responsible ministers, and can only bind the State and pledge the national faith through their agency. In the latter, the supreme executive magistrate can not be supposed to have any relations with a foreign sovereign, such as would require or authorize direct negotiations between them respecting the mutual interests of the two States. (Lawrence's Wheaton on International Law, pp. 384 and 385.)

Mr. Jefferson, in 1790, expressed his opinion upon this question as follows:

The Constitution having declared that the President shall *nominate*, and, by and with the advice and consent of the Senate, shall *appoint* ambassadors, other public ministers, and consuls, the President desired my opinion whether the Senate has a right to negative the *grade* he may think it expedient to

use in a foreign mission as well as the *person* to be appointed.

I think the Senate has no right to negative the *grade*. (7 Jeff. Works, 465.)

Mr. Madison, in a letter to President Monroe, May 6, 1822, uses this language:

> It appears that the Senate have been discussing the precedents relating to the appointment of public ministers. One question is whether a public minister be an officer in the strict constitutional sense. If he is, the appointment of him must be authorized by *law*, not by the President and Senate. If, on the other hand, the appointment creates the office, the office must expire with the appointment, as an office created by law expires with the law; and there can be no difference between courts to which a public minister has been sent and those to which one was sent for the first time. According to my recollection this subject was on some occasions carefully searched into, and it was found that the practice of the government had from the beginning been regulated by the idea that the places or offices of public ministers and consuls existed under the law and usages of nations, and were always open to receive appointments as they might be made under competent authorities." (3 Madison's Writings, 268.)

In 1792, the question arose in the Senate whether the power of the Senate over the appointment gave that body a right to inquire into the policy of making any such appointment, or instituting any mission, or whether their power was confined to the consideration of the mere fitness of the person nominated for the office; and it was decided by a small majority that they (the Senate) had no right to enter upon the consideration of the policy or fitness of the

mission. (5 Marshall's Life of Washington, ch. 5, p. 370, note.)

It is true, however, that in practice there has been some looseness of expression both in statutes and in executive language. And it is also true that the Senate and Congress have, apparently, ignored or contradicted these doctrines at times. The Senate has on several occasions decided differently, and particularly in regard to missions to Russia and Turkey (2 Story's Com. Con., 1,534, *n.*). It was enacted in the appropriation act for the consular and diplomatic service, approved May 22, 1872, that there be but one minister resident accredited to Guatemala, Costa Rica, Honduras, Salvador, and Nicaragua, and that the President be authorized to select the place of residence for the minister in any one of those States. (17 Stat. L., 142.) By an act approved June 5, 1862, it was enacted:

> That the President of the United States be, and he hereby is, authorized, by and with the advice and consent of the Senate, to appoint diplomatic representatives of the United States to the Republics of Hayti and Liberia, respectively. Each of the said representatives so appointed shall be accredited as commissioner and consul-general, and shall receive the compensation of commissioners according to the act of Congress approved August 18, 1856: *Provided*, That the annual compensation of the representative at Liberia shall not exceed $4,000. (12 Stat. L., 421.)

And there have been other instances. While the Executive has never yielded the prerogative of this control over diplomatic intercourse with foreign nations, the wishes

of Congress thus expressed have generally been acquiesced in. The President, continuing to exercise this power invariably, has given his approval to the appropriation acts, because a failure or refusal so to do would have embarrassed the diplomatic and consular system. Speaking of these statutes, the Chief Justice of the Court of Claims tersely says, in *Foote* vs. *U. S.* (23 Ct. Clms., 449):

> Perhaps these recent exceptions may be interpreted only as indicating the officers that Congress was willing to appropriate salaries for, and not as interfering with the constitutional rights claimed for the President.

In 1855 Congress passed the first act which attempted to systematize and codify the diplomatic and consular service. This act, "An act to remodel the diplomatic and consular systems of the United States," approved March 1, 1855, provided for but one grade of representatives to foreign countries—envoys extraordinary and ministers plenipotentiary—and directed that the President "shall" appoint such ministers from and after a certain day, and fixed the compensation for the services (10 Stat. L., 619). At the request of the President the Attorney-General gave an elaborate opinion upon the powers and constitutional rights of the Executive in making appointments of foreign ministers, from which we have quoted at length in this brief.

Mr. Cushing contended that the words "from and after" denote the day when the act shall take effect; and that the word "shall" is to be construed "may;" that it is a word of tense and not of command. In this way all objections on the ground of unconstitutionality were

overcome; and the President, accepting the wishes of Congress, acted in accordance with the precedents in the appointments and the classification of the embassies. In the same spirit and recognition at the first session of the next Congress, after debate in which this constitutional view was fairly stated, Congress, by an "Act to regulate the diplomatic and consular systems of the United States," approved August 18, 1856 (11 Stat. L., 52), expressly repealed the act of March 1, 1855.

The grades of embassies as determined by international law were recognized; all words expressive of control over appointment or designation were omitted; a schedule of compensation for all representatives was fixed. Compensation for ambassadors, envoys extraordinary and ministers plenipotentiary was arbitrarily settled according to the countries to which these might be appointed. Ministers of inferior rank were to receive a certain per centum of the compensation allowed for a minister of the first and second ranks to the countries named in the commissions.

The Revised Statutes (1874), section 1675, followed the language of the appropriation acts, without embracing the provisions of the general act of August 18, 1856. This oversight was promptly corrected by the amendatory act, approved March 3, 1875 (18 Stat. L., 483), which is included in the second edition of the Revised Statutes, and a return was had to the system organized by the act of 1856. We shall presently have occasion to note the changes made by the later act.

It may be assumed as settled in this country that the policy of instituting foreign missions and appointing rep-

resentatives is within the power of the Executive alone; that the power of determining the fitness of the person nominated is conjointly with the President and the Senate, and that the compensation to be made is a matter for provision by Congress. The Court of Claims has so decided in several well considered cases. (*Byers* v. *The United States*, 22 Ct. Cls., 59; *Francis* v. *The United States*, *id.*, 403; *Foote* v. *United States*, 23 Ct. Cls., 443.)

It follows then that there is no necessary relation between the grade of a mission and the compensation of the minister. This compensation is within the power of Congress and has varied at different times and for representatives to the same countries. It has been increased and diminished without consideration of rank; and this action has been had by specific statute, and by provisions in the appropriation acts that the appropriations shall be in full compensation for the service, or that the salaries provided in the acts for the officers named respectively shall be in full for the annual salaries thereof from and after the first day of the fiscal year, all acts and parts of acts in conflict with these provisions being repealed. (12 Stat. L., 421; 14 *id.*, 225; 17 *id.*, 143; 18 *id.*, 483; 20 *id.*, 91.)

II.

The claimant seeks to recover under the provisions of this act of 1875.

> Ambassadors and envoys extraordinary and ministers plenipotentiary shall be entitled to compensation at the rates following, per annum, namely:
>
> Those to France, Germany, Great Britain, and Russia, each, seventeen thousand five hundred dollars.

Those to Austria, Brazil, China, Italy, Japan, Mexico, and Spain, each, twelve thousand dollars.

Those to all other countries, *unless where a different compensation is prescribed by law*, each, ten thousand dollars.

And, *unless when otherwise provided by law*, ministers resident and commissioners shall be entitled to compensation at the rate of seventy-five per centum, and secretaries of legation at the rate fifteen per centum of the amounts allowed to ambassadors, envoys extraordinary, and ministers plenipotentiary to the said countries respectively.

The words in italics were not in the act of August 18, 1856. They seem to have been inserted out of caution.

Under the act of 1856 the representative to Turkey was ranked and paid as a minister resident. For many years the appropriations were made of a sum gross. After 1872 the amounts of salaries were specifically mentioned and graduated by the rule prescribed in both the acts of 1856 and 1875. The minister to Turkey received a salary of $7,500.

General Wallace received this salary as minister resident from the date of his appointment until July 13, 1882. At that time he was appointed by the President, by and with the advice and consent of the Senate, envoy extraordinary and minister plenipotentiary. In the appropriation act for that year, approved July 1, 1882, *before the appointment*, $7,500 were appropriated for the salary of envoy extraordinary and minister plenipotentiary to Turkey. This was an amendment to an appropriation of that amount for minister resident and consul-general.

This court said, in *United States* v. *Mitchell*, 109 U. S., 146, which was a case for salary as interpreter:

> The whole question depends on the intention of Congress as expressed in the statutes. Whether a simple failure by Congress to appropriate any or a sufficient sum to pay the salary of an officer fixed by previous law is, of itself, an expression of purpose by Congress to reduce the salary, we do not now decide. That is not this case. On the contrary, in this case Congress has in other ways expressed its purpose to reduce for the time being the salaries of the interpreters.

How could the intention of Congress be more plainly expressed than it was in the case of this claimant? There is no difficulty in reconciling this statute with section 1675, Rev. Statutes, the act of 1875. This is the very contingency provided for. This is "where a different compensation is prescribed by law." After the compensation was established the President, in view of it, made the nomination. Through the Secretary of State, the channel recognized by diplomatic law and custom, he accompanied the commission with the announcement of the action of Congress. General Wallace accepted the appointment and made out his accounts as minister plenipotentiary at a salary of seven thousand five hundred dollars per annum (Tr., p. 3). There was perfect accord and understanding upon the part of the President, Congress, and the minister. The intention of Congress has over it not a shadow.

But the claimant earnestly contends that this case comes within the cases of *Foote* v. *United States* (23 C. Cls. R., 443), and *United States* v. *Langston* (118 U. S. R., 389).

The cases are easily distinguished. Foote's case was this:

Lucius H. Foote was appointed envoy extraordinary and minister plenipotentiary to Corea February 27, 1883. The President, through the Secretary of State, in his letter of instructions, informed him that his salary was at the rate of $5,000 per annum. There was no appropriation at the time, nor was there any for the grade to which he had been appointed at any time; but by act of Congress July 7, 1884 (23 Stat. L., 228), $5,000 a year were appropriated for salary of a minister resident and consul-general at Corea.

The President immediately nominated and, by and with the advice and consent of the Senate, appointed Mr. Foote to this latter grade. Mr. Foote declined to accept, but acted for some time in this, what he styled, "anomalous status." He was paid at the rate fixed, first, from February 27, 1883, to June 30, 1883, out of the appropriation for "contingent expenses of foreign intercourse proper, and all the missions abroad, $85,000" (22 Stat. L., 129); second, for the fiscal year ending June 30, 1884, out of the appropriation "to extend diplomatic relations with the Government of Eastern Asia" (22 Stat. L., 431); third, for the remainder of the time out of the appropriation for minister resident and consul-general to Corea (22 Stat. L., 228).

The court held that he was entitled to the full salary provided in the statute while he was envoy extraordinary and minister plenipotentiary; that the power to fix compensation for diplomatic officers was in Congress alone, and that Congress having made no direct appropriation

whatever for the salary of his office he could recover it under the provisions of section 1675. This case of Foote's is the exact opposite on the facts, to the case of Wallace. The reason given why Foote could recover is the very reason why Wallace can not.

So is the case of Langston, upon principle, against the contention of the claimant. Langston was appointed minister resident and consul-general to Hayti. At that time a statute was in force which provided that the representative to Hayti shall be entitled to a salary of $7,500 a year. That amount was regularly appropriated for many years. In two of the appropriation acts, where this amount for this purpose was appropriated, it is provided that these salaries shall be in full for the annual salaries of the officers named. But afterwards, during Langston's term of service, his salary was appropriated for at the rate of $5,000 per year.

> This court held that a statute fixing the salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriate a less amount for the services of such officer, for particular fiscal years, and which contain no words that expressly or by clear implication modify or repeal the previous law.

Mr. Justice Harlan, delivering the opinion of the court, distinguishing the cases of *United States* v. *Fisher* (109 U. S., 143) and *United States* v. *Mitchell* (*id.*, 146) uses the following language:

> The case before us does not come within the principle that controlled the determination of the other

cases. The salary of the minister to Hayti was originally fixed at the sum of $7,500. Neither of the acts appropriating $5,000 for his benefit, during the fiscal years in question, contains any language to the effect that such sum shall be "in full compensation" for those years; nor was there in either of them an appropriation of money "for additional pay," from which it might be inferred that Congress intended to repeal the act fixing his annual salary at $7,500. Repeals by implication are not favored. It can not be said that there is a positive repugnancy between the old and the new statutes in question.

* * * * *

The suggestions of most weight in support of the view that Congress intended to reduce the salary of the diplomatic representative at Hayti, is the improbability that that body would neglect, in any year, to appropriate the full sum to which that officer was entitled under the law as it then existed. On the other hand, it is not probable that Congress, knowing, as we must presume it did, that that officer had, in virtue of a statute—whose object was to fix his salary—received annually a salary of $7,500 from the date of the creation of his office, and after expressly declaring in the act of 1878 (20 Stat. at L., 91, 98) that he should receive that salary from and after July 1, 1878, and again in 1879, that he should receive the same amount from and after July 1, 1879, should, at a subsequent date, make a permanent reduction of his salary without indicating its purpose to do so, either by express words of repeal or by such provisions as would compel the courts to say that harmony between the old and the new statute was impossible.

In Langston's case the salary was fixed by a specific statute, and Congress failed to appropriate the full amount.

In the case before the court now the compensation was fixed by Congress for an embassy not then established. It was clearly, on the authorities we have cited, an expression on the part of Congress that if the President, by and with the advice and consent of the Senate, appointed an envoy extraordinary and minister plenipotentiary to Turkey he should receive a salary of $7,500 annually. Subsequently, in the light of this legislation, General Wallace was so appointed and so paid. We confidently submit he is entitled to nothing more.

Similar questions were before the Court of Claims in the case of *Francis* v. *United States* (22 C. Cls. R., 403). That court in an elaborate opinion held that a claimant upon a state of facts resembling those in this record could not recover, and this case at bar was decided upon the reasoning of that.

Respectfully,

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